United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-7317

To be argued by
LYMAN STANSKY

In The

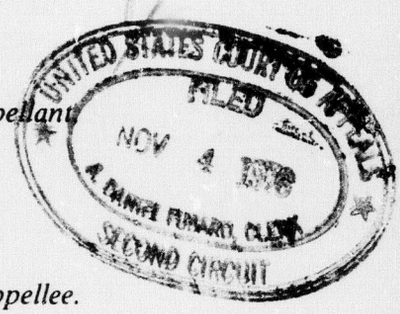
United States Court of Appeals

For The Second Circuit

GEORGE STROGANOFF-SCHERBATOFF,
Plaintiff-Appellant,

-against-

HENRY H. WELDON,
Defendant-Appellee.



GEORGE STROGANOFF-SCHERBATOFF,
Plaintiff-Appellant,

-against-

CHARLES B. WRIGHTSMAN and JAYNE WRIGHTSMAN,
Defendants-Appellees.

GEORGE STROGANOFF-SCHERBATOFF,
Plaintiff-Appellant,

-against-

METROPOLITAN MUSEUM OF ART,
Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of New York.

REPLY BRIEF FOR PLAINTIFF-APPELLANT

LYMAN STANSKY
Attorney for Plaintiff-Appellant
George Stroganoff-Scherbatoff
667 Madison Avenue
New York, New York 10021
(212) PL 3-9755

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STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

LYMAN STANSKY, being duly sworn, deposes and says, that deponent is over the age of 21.

That on the 3rd day of November, 1976, deponent served two (2) copies of Appellant's Brief and Reply Brief upon Davis, Polk & Wardwell, Esqs., Lord, Day & Lord, Esqs., and Thal & Youtt, Esqs., respectively the attorneys for Charles B. Wrightsman and Jayne Wrightsman, Metropolitan Museum of Art, and Henry H. Weldon, appellees in this action, at their respective addresses: #1 Chase Manhattan Plaza, New York, N.Y. 10005; #25 Broadway, New York, N.Y. 10004; and #919 Third Avenue, New York, N.Y. 10022; the respective addresses designated by said attorneys for that purpose, by depositing two true copies of the same enclosed in post-paid properly addressed wrappers, in a post office, official depository under the exclusive care and custody of the United States post office department within NewYork State.

Sworn to before me this)
3rd day of November, 1976.)

Lyman Stansky

CATHERINE NARDIELLO
Commissioner of Deeds, City of New York
N. Y. Co. Clks. No. 8, Reg. No. C-N-12
Commission Expires Jan. 1, 19[illegible]

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REPLY BRIEF FOR PLAINTIFF-APPELLANT

This reply brief is made necessary by appellees' failure to demonstrate the correctness of the judgments, by their ignoring the facts that make the Act of State doctrine inapplicable.

ARGUMENT

Assuming the authenticity of all the ukases, decrees, pronouncements, pamphlets, magazine articles, etc. with which the court below was deluged by appellees, they still do not prove that they had any impact on the Stroganoff collection.

The court below and appellees ignore the fact that the confiscation under the decrees that were presented, affected only the personal property of those who had fled the jurisdiction. The owner of the Stroganoff collection had not fled (120a-3)
(Appellant's Affidavit Dec. 1, 1975, p. 3).

Appellant does not claim that a confiscation by the USSR made even in violation of USSR laws, would not have effectively nationalized the collection. He does claim that the very documents produced by appellees negative their claim that there was a confiscation or nationalization. The very decree that exempted the personal property of those who had not fled, prohibited the sale of such property.

POINT I

APPELLEES' RELIANCE ON PRINCESS PALEY OLGA V. WEISZ (1929), 1 K.B. 178 (C.A.) SUPPORTS CLAIM THAT GRANTING SUMMARY JUDGMENT WAS ERROR.

In his memorandum the court below stated that in Olga, the "British Court of Appeal was faced with a case involving

(155a-7)

similar facts" (Memorandum, page 7). He thereby disregarded the crucial factual difference between Olga and the facts at bar. There, plaintiff had admittedly fled the jurisdiction, thus making Decree No. 111 applicable to her. The judgment against Olga as plaintiff, was based on that admitted fact. At bar, appellant's claim under oath, that the confiscation decree as presented by appellees, did not affect the Stroganoff Collection because the then owner had not fled the country after the revolution.

In view of appellant's position that appellees failed to sustain their burden of proving confiscation in the USSR, the observations made in Olga by Sankey L.J. are pertinent to appellant's argument that the issue cannot be resolved except by trial, rather than by summary disposition of disputed factual issues:

> "Great difficulties have arisen in this and similar cases in ascertaining the exact effect of the Soviet law. The opposing parties cannot agree on a proper translation; their expert witnesses differ as to the Russian meaning of the legislation, while the English translation, which in some passages is obviously a literal rendering of the original, is also susceptible of various meanings. Over and above that, the legal principles involved are so different from our own that it is difficult to appreciate and apply them."

> "In my opinion this (Decree No. 111) vested in the Soviet government, the property of persons who fled, as the Princess unfortunately was compelled to do...".
>
> "The plaintiff having established that the articles in question in this case were originally her property the onus is upon the defendants to prove that the property in the goods had before April 1928, passed to the Soviet Republic."

He found that defendants had sustained that burden because

1. The seizure in 1918 was an Act of State that transferred title to the state;

2. That by Decree No. 111 the property passed from plaintiff to the Soviet Republic <u>because she fled the country</u>; and

3. That Decree No. 245 nationalized the goods.

Noting that Weisz had bought the objects in Russia, Russell L. J. commented on the Council of People's Commissaries decree which appellees at bar claim proves confiscation, in the following language:

> "Concerning the registration, placing on inventory and safeguarding of works of art and antiques...<u>this decree does not seem to involve or produce any change in the ownership of the chattels covered by it</u>." (emphasis supplied).

At bar the uncontradicted proof is that the owner of the Stroganoff collection when these decrees became operative, had not fled the country but had been in residence outside the

(26a-6; 54a-13)
country since 1898 (Appellant's Affidavit, December 1, 1975, page 3).

Appellees also omit the fact, sworn to in the same affi-
(109a-2; 123a-6,7)
davit (p. 7) that the same decree read in part:

> "(a) The export and sale abroad of the aforesaid objects is forbidden."

Assuming arguendo, that these were valid decrees, when and how was the prohibition lifted so as to make the 1931 sale in Berlin a sale within the delegated power of the seller. Or was the commercial representative, or whatever Handelsvert-retung may be translated into, acting on its own in violation of USSR law?

Relevant to this issue is Alfred Dunhill of London v. The Republic of Cuba, 96 Supreme Court 852, decided May 24, 1976, based on the facts and decision in Menendez v. Saks and Company, 485 F.2d 1355 (1973), where the court said:

> "The test is not whether the act was embodied in a 'formal decree of general application,' which the district court deemed essential, 345 F.Supp. at 545, but whether the agent acted within the scope of his authority as a representative of the foreign government. For instance, in Underhill v. Hernandez, 168 U.S. 250, 18 S.Ct. 83, 42 L. Ed. 456 (1897), the fountainhead of the act of state doctrine in this country, the conduct of the foreign military commander, which was the basis of the suit, was impromptu in character and not incorporated in any 'formal... decree of general application.' Never-

> theless it was held to constitute an act of state, the Supreme Court (168 U.S. at 254, 18 S.Ct. 83) approving our court's conclusion that 'the acts of the official representatives of the state are those of the state itself, when exercised within the scope of their delegated powers.' 65 F. 577, 579." (emphasis supplied).

This had been precisely the point raised by appellant on December 18, 1975, the affiant swearing:

> "Assuming arguendo that these (1. The Handelsvertretung (Catalogue, Exhibit B); 2. The Museum Fund (Exhibit C); 3. Central Executive Committee (Exhibit G); and 4. Council of Peoples' Commissars (Exhibit G)) were governto this court to indicate their power or scope, nor source thereof, by constitution, statute, decree, or otherwise, to prove that their impact on the fate of the Diderot, was government sanctioned, i.e., an act of government. Such proof is the sine qua non of defendant's burden."

Wrightsman blandly asserts (Brief, page 12) that it is "incontrovertible" that the State is "the only avenue of international trade" and presents "additional Soviet Statutory, etc. material" in three sections, none of which is part of the records of this court. Even if they were, their relevance eludes. It goes "Trotsky - Employment of Former Generals - Excerpt from a Speech"; next item, Nationalized Foreign Trade specifying only "all kinds of produce (raw, industrial, agricultural, etc.) and forbids all export and import agreements.

Are antiques or works of art "raw, industrial or agricultural" or even "etc." products? Article 49 is concerned with Compulsory Military Training. Category 2 purports to be a translation of some sections of the July 10, 1918 Constitute and contains an admirable Bill of Rights of the ordinary citizen. On page 81, the organization of the Central Authority is discussed; The All-Russian Central Executive Committee (page 82), the Council of People's Commissaries (page 83) followed by the statement that the All-Russian Congress of Soviets and the All-Russian Central Executive Committee have jurisdiction of "all questions of national importance." These run from "a" to "q", but none relates to museums or works of art or to the Stroganoff Collection.

Diligent perusal of the balance of this presentation fails to do more than support appellant's position that they are irrelevant to the issues at bar. None establishes the authority of any of the organizations mentioned, to confiscate the property involved.

POINT II

APPELLANT DID NOT RELY ON HIS PLEADINGS ONLY, BUT PRESENTED SWORN FACTUAL STATEMENTS SUFFICIENT TO RAISE ISSUES OF FACT THAT SHOULD NOT BE RESOLVED WITHOUT TRIAL.

Appellees claim that Rule 56(e) of the Federal Rules of Civil Procedure prohibits a party from resting "upon the mere allegations or denials of his pleading but his response by affidavits or as otherwise provided...must set forth specific facts showing that there is a genuine issue for trial." In the light of the references to affidavits heretofore submitted it would appear that this argument is not supported by the record.

The Wrightsmans argue that certain admissions of appellant are sufficient to sustain the judgment. They cite appellant's examinations before trial in another case and the admissions that the house and the real property had been nationalized (Wrightsman brief, page 13) and that

> "plaintiff's belated attempt to retract an admission...is transparent and should be disregarded..." (p. 17).

The decree exempted only personal property, not real estate. No claim is made that Stroganoff real estate was immune.

Appellant's claim that the confiscation took place in Berlin, is not inconsistent with his position that it had not taken

place in the USSR. If the property had not been confiscated within the USSR, then the sale in Berlin by some organization, even if a branch or agency of the USSR, was not proved by appellees to have been acting within its delegated powers (see Dunhill, supra). If it was an agency beyond its delegated authorization in Berlin in 1931, and if the property had not been confiscated in the USSR before 1931, then, the confiscation took place outside the USSR and would not have been an act of state.

Appellees seek to make capital of alleged admissions at a pre-trial deposition in another case involving similar factual situations. Rule 30(e) of the Federal Rules of Civil Procedure provides:

> "When the testimony is fully transcribed the deposition shall be submitted to the witness...Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them."

Appellant did not stipulate to waive the signing of the deposition nor should it have been considered an admission against interest when appellant under oath set forth a correct response to the question.

Wrightsmans argue (Brief, page 18) that "extrinsic evidence of authenticity is not required as to 'books, pamphlets

or other publications purported to be issued by public authority'" but makes no pretense that Exhibit D, the Bulletin of the Society of the History of French Law was issued by public authority, or that the Herald Tribune newspaper's report had such origin. Appellant does not dispute the existence of these publications, but only the correctness of their respective contents.

It is on the truth of the contents of Exhibits C and D that appellees base their claim that they have satisfied their burden of proof. Appellant does not dispute that these documents exist but does dispute that their contents are factual, and if factual, disputes their relevance to the issues at bar.

At trial, Stroganoff will present the fact suggested by the history of Dunhill, that the alleged confiscation, even if it took place, was a commercial or proprietary transaction of a foreign state, and not a public or government action, so that our courts will be available to grant redress. It may be that our courts are right to exclude from the operation of the Act of State doctrine, commercial acts which are in effect an unwarranted extension of the doctrine. As set forth in the Dunhill appendix, the Legal Advisor of the Department of State wrote to the Solicitor General of the United States on November 26, 1975:

> "English law from which our own Act of State doctrine derived does not require British courts to abstain from reviewing state acts under international law."

it may be that the cases at bar will be the springboard for a much hinted at modification and amelioration of the Act of State doctrine as applied in Sabattino!

POINT III

APPELLANT IS ENTITLED TO A PLENARY TRIAL ON THE MERITS.

At a plenary trial, of which the judgment below has deprived appellant, he is prepared to prove:

1. That the Stroganoff Collection had not been confiscated in the USSR prior to May 1931.

2. With respect to the right of appellant's mother to make demand for the object from persons unknown in some European jurisdiction, that the statute of limitations in France and Germany ran for much longer than ours, and that in any event the New York State statute of limitations is not relevant because the persons on whom demand could be made were unknown.

3. That her objection to the sale in Berlin was based on an understandable confusion as to who had done what to whom, when even the English courts in 1929 had difficulty in understanding the Russian laws and decrees, five years after negotiation.

4. That appellant made demand within a reasonable time after ascertaining the location of the objects.

5. That there had been no confiscation in the USSR, from which it would follow that the confiscation took place in Berlin.

6. That if Handelsvertretung was a branch or agency of the USSR it had no legal authorization or power to sell the Stroganoff Collection in Berlin.

POINT IV

THE STATUTE OF LIMITATIONS IS NOT A RELEVANT ISSUE ON APPEAL.

The judgments are based solely on the application of the Act of State doctrine. Although Weldon concedes that the court below had not reached "the Statute of Limitations issue", he brings it up again on the theory that a judgment should be affirmed if correct even if the reasons given by the court below are erroneous (Weldon Brief, page 22). That point was not briefed in appellant's main brief because it is, strictly speaking, obiter dictum.

In repeating this argument Weldon miscontrues the impact of the New York Statute of Limitations. Appellant had made written demand on Weldon on December 21, 1973, and the action for conversion had been instituted on February 6, 1974. Al-

though there had been no opportunity prior hereto to discuss the question of timing, it should be noted that in his affidavit of December 1, 1974 in Wrightsman, appellant had sworn:

> "I lost track of this object until late in 1974 when I saw it with defendants' names on it, at the Metropolitan Museum of Art in New York. On November 21, 1974 I made written demand on the defendants for its return to me. After this action was brought I was apprised of defendants' claim that they had donated it to the museum in 1974. I thereupon made written demand upon, and thereafter sued the museum (75 CIV. 3174)."

On appellant's assumption that Weldon, the Wrightsmans, and Metropolitan, when they purchased or acquired the objects of art, had no knowledge of their prior history, a demand was necessary to transform their theretofore peaceful or "lawful" possession into a conversion on refusal to turn over to the rightful owner. But demand could not be made until the object had been located and possessor identified. A demand cannot be made in vacuo on persons unknown.

In Menzel v. List, 24 N.Y.2d 91, plaintiff made demand for her Chagell in New York in 1962 when she found it here in List's possession. It had been expropriated in Belgium in 1941 by Goering's bully boys. Affirming the denial of defendant's motion to dismiss the conversion complaint on statute of limitations grounds, the Appellate Division said in 23 A.D.

2d 647:

> "The precedents in this State suggest that with respect to a bona fide purchaser of personal property a demand by the rightful owner is a substantive, rather than a procedural, prerequisite to the bringing of an action for conversion by the owner (Gillet v. Roberts, 57 N.Y. 28; 1 Weinstein-Korn-Miller, N.Y. Civ. Prac. Para. 206.01 and cases cited; 36 N.Y. Jr., Limitations and Laches, §62; but, see Restatement, Torts, §§229, 899, Comment c. at p. 526). If that be so, then the statute of limitations did not begin to run until demand and refusal...". (emphasis supplied).

The court below had also referred, obiter, to the protest of appellant's mother, made by her from her residence in France in 1931, against the sale in Berlin, of "her property." Appellees bring this up again on appeal. But a protest is not a demand for delivery, and without knowing who had bought, on whom could such a demand have been made? Assuming that she identified the USSR as the unlawful predators, is this any more than the claim that there had been no confiscation in the USSR prior to 1931? Also, this would not be the first time that the identity of the oppressor has been mistaken by his victim. She assumed, but could not know, that it was the USSR that had appropriated her property. Absent proof by appellees of confiscation in the USSR, a unilateral mistake of fact

should not avail to defeat appellant's rights.

There was no proof below that she was correct in this identification, nor that there had been a confiscation by the USSR in Russia prior to the 1931 sale in Berlin. A trial may demonstrate that there was none, or at least that appellees failed to sustain their burden of proving that there had been.

Respectfully submitted,

LYMAN STANSKY
Attorney for Plaintiff-
Appellant